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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In the Matter of:

Case No.

LEHMAN BROTHERS HOLDINGS INC., ET AL., 08-13555-jmp  
Debtors.

- - - - -x

In the Matter of:

Case No.

LEHMAN BROTHERS INC., 08-01420-jmp SIPA  
Debtor.

- - - - -x

U.S. Bankruptcy Court  
One Bowling Green  
New York, New York  
May 18, 2011  
2:07 PM

B E F O R E:  
HON. JAMES M. PECK  
U.S. BANKRUPTCY JUDGE

Pre-Trial Conference [Adversary Case No. 11-01681, Giddens v.  
Citibank, N.A.]

Presentment of Order Establishing Briefing and Hearing Schedule  
[Adversary Case No. 11-01540, Kathleen Arnold and Timothy A.  
Cotten v. Lehman Brothers Holdings Inc.]

Aurora Bank FSB's Motion to Dismiss Adversary Complaint  
[Adversary Case No. 11-01353 The Brooklyn Hospital Center v.  
Aurora Bank FSB f/k/a Lehman Brothers Bank FSB]

Transcribed by: Dena Page

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15  
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17 CLAUDIO HAMMERMAN, ESQ.

18  
19  
20 ALSO PRESENT:

21 KATHLEEN ARNOLD, Party Pro Se (Telephonically)

22 TIMOTHY COTTEN, Party Pro Se (Telephonically)

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P R O C E E D I N G S

THE COURT: I think the first matter for the afternoon calendar is Giddens v. Citibank.

MR. MENAKER: Good afternoon, Your Honor. Richard Menaker, special counsel to the trustee, 10 East 40th Street, New York, 10016.

THE COURT: Okay. I'll take other appearances, as well.

MR. SHIMSHAK: Good afternoon, Your Honor. Steve Shimshak, Paul, Weiss, for Citibank.

MS. HAMMERMAN: Claudia Hammerman, also Paul, Weiss, for Citibank.

THE COURT: Okay, I know this is a case that already has a scheduling order, but we haven't had a pre-trial. Are things going well? Do you need an adjustment to the order? I know that there's some things to happen, I think it's on May 26th.

MR. MENAKER: This matter's been handled cooperatively from the word go. In fact, the parties cooperated long before we ever filed. The principals had discussions, there was much amicable communication over a possible resolution. There are some intellectual issues that are going to require rulings. We're sorry we have to be here for that, but I'm pleased to be able to report that all has gone smoothly, it continues to go smoothly, and we don't see any need for judicial intervention.

1 Certainly to date, we haven't had any need for judicial  
2 intervention and don't see any need for the near future.

3 May 26th is going to be the initial motion date;  
4 that's when opening papers will be served. The trustee will  
5 serve his papers at the beginning of August. Reply comes in in  
6 September. So there's an extended period where we will be  
7 teeing up the issues for the Court's consideration. In the  
8 meantime, discovery proceeds on a cooperative basis. We're  
9 meeting and conferring even before objections have been issued  
10 to see if we can narrow things and get those aspects worked  
11 out.

12 If a further settlement conference seems  
13 appropriate -- or, sorry, if a further status conference,  
14 rather, seems appropriate, we will contact chambers, set it up  
15 for a Lehman regular date, but at this point, it may be we  
16 won't have to be before the Court until the motion has already  
17 been presented. And that's really all I have.

18 THE COURT: Okay. I don't want too much of a preview,  
19 but given the communications that you've described as being  
20 quite excellent and the fact that there may be some issues that  
21 you describe as intellectual ones, can you give me a preview as  
22 to what kinds of issues you anticipate will be presented for  
23 judicial determination?

24 MR. MENAKER: Sure. The broker-dealer is a creditor  
25 of Citibank and certain of its affiliates in virtue of the fact

1 that it had big deposits with Citibank here, all over the  
2 world. And at the time of filing, there was a billion dollars  
3 in a single account and there were deposits in many parts of  
4 the world in excess of 360 million dollars. At the same time,  
5 Citibank has been a creditor as a service provider to the  
6 broker-dealer, largely, or primarily in the basis of the fact  
7 that it was providing a kind of service, a payment  
8 administrative service or settlement service in the continuous  
9 linked settlement process for handling foreign exchange. This  
10 is that program that was developed in order to avoid the  
11 Herstatt issues and has been in place for about a decade. So  
12 Citibank was our settlement member with the CLS bank  
13 administering payments.

14 On September 15th, Citibank -- this is 2008, of  
15 course, Citibank terminated its service agreement with LBI and  
16 then, being pleaded for on bended knee that it continue this,  
17 said, well, you've got to deposit a billion dollars with us.  
18 And a billion-dollar deposit was set up of very much-needed  
19 funds, but it was put in Citibank's hands, and Citibank  
20 continued administering the CLS settlement. By the end of the  
21 week, an indebtedness had emerged in connection with these  
22 services, and at the time of filing, there was -- and we would  
23 submit, after filing, there was a setoff of that billion  
24 dollars and a freeze on the 300 million-plus in the various  
25 accounts around the world. And this adversary proceeding is an

1 effort by the trustee to reclaim those deposited funds.

2 There are some other types of issues -- claims between  
3 the parties that are in the single-digit millions or tens of  
4 millions and are relatively small compared to the big CLS  
5 issues. We know that Citibank's view of this is that it has a  
6 right of triangular setoff. We know that Citibank is taking a  
7 position that the CLS services that it was providing was safe-  
8 harbored, so they're going to make safe harbor insulation  
9 arguments. They may make other arguments in their motion;  
10 obviously, it hasn't come in yet. But it's -- the kinds of  
11 issues that will be presented to the Court will be, to some  
12 degree, familiar issues from other proceedings, and the Court  
13 will also want to know about CLS and how CLS works, how that  
14 settlement process works. And I think some of that will be  
15 fact-intensive and some of it will involve applying some basic  
16 principles of bankruptcy law to a field of commerce which has  
17 not been heavily litigated. In fact, we've had difficulty  
18 finding anything where CLS has actually been ruled upon by any  
19 courts.

20 THE COURT: All right, as a result of that, Mr.  
21 Shimshak, do you want to say a few words?

22 MR. SHIMSHAK: Yeah, I do want to say a few words.  
23 First, I wanted to say that Mr. Menaker has accurately  
24 characterized the relationship that we've had in the past many  
25 months as we've tried to work through the issues, but they've



1 culminated in our being here before you in this adversary  
2 proceeding.

3 He is correct that we will be filing a motion to  
4 dismiss on the 26th. That motion to dismiss -- and here I  
5 deviate from his account -- it will not be dependent on  
6 additional facts because it's a motion to dismiss. It's going  
7 to be based on the allegations of the complaint. And we  
8 believe that based on those allegations, we will be able to  
9 demonstrate to your satisfaction the application of the safe  
10 harbors to the CLS relationship that Citi had with Lehman  
11 Brothers Inc.

12 In addition, the complaint contains more traditional  
13 avoidance claims, those focusing in Section 544, 548, 547, and  
14 the like. We believe that those claims as pled are deficient  
15 on their face, and we'll be moving to dismiss those claims.

16 I wanted to alert the Court to one other thing which I  
17 don't think is covered by the agreed order. There have been a  
18 series of stipulations that we've executed since the beginning  
19 of the case with LBI, rolling forward, our obligation to seek  
20 relief from the automatic stay as to some of these remaining  
21 accounts. We do have a one billion dollar setoff which we  
22 maintain we took before the petition date, though for purposes  
23 of the application of the safe harbors, it doesn't really  
24 matter whether it was before or after, but in contrast to Mr.  
25 Menaker, we believe through appropriate judicial notice, we can

1 demonstrate that it occurred before the petition date.

2 But then there are accounts where we have not  
3 exercised our right of setoff, as yet. We believe those, too,  
4 are within the safe harbor protection, and with the advent of  
5 the litigation, we are obligated, now, to seek relief from the  
6 stay to effectuate those remaining setoffs. So while he seeks  
7 the turnover of the accounts, we seek, correspondingly, to  
8 exercise rights of setoff against them. We will be filing, in  
9 addition to our motion to dismiss, a separate motion on that  
10 date, on the 26th of May.

11 Now, to give you a preview of where we see this going  
12 procedurally, because the issues are ultimately so intertwined,  
13 we propose that that matter move in companionship with this  
14 matter and that ultimately the adjudication of the rights in  
15 the accounts and our rights of setoff are all of a piece and  
16 thus, on the face of the motion, you will see that while we  
17 have the statutory right under Section 362 to have this matter  
18 heard after sixty days, we are prepared to continue that in  
19 companionship with the underlying adversary proceeding.

20 THE COURT: Would there be a stipulation or some other  
21 writing that will evidence what you just said?

22 MR. SHIMSHAK: We haven't gotten to that point.  
23 Frankly, the issues surrounding the adversary proceeding  
24 presented their own complexity in terms of putting those two  
25 things together because the adversary proceeding was a separate

1 litigation, as is the stay relief motion. So when we meet and  
2 confer, our hope is that we can work out a satisfactory order,  
3 I predict immediately after the motion is filed. But I don't  
4 anticipate, given the relationship that we've had with Mr.  
5 Menaker's firm, that we're going to have any difficulty in  
6 reaching an accommodation.

7 THE COURT: Fine. I appreciate your bringing all this  
8 to my attention. Is there anything more?

9 Fine.

10 MR. MENAKER: No, Your Honor, except that I agree as  
11 far as working out the stipulation, that I'm sure we'll have no  
12 problems on that.

13 THE COURT: I rather guess that the next time that  
14 I'll see you will be an argument in connection with a motion to  
15 dismiss.

16 Okay, fine.

17 MR. MENAKER: May we be excused, Your Honor?

18 THE COURT: You may be excused.

19 MR. MENAKER: Thank you, Your Honor.

20 THE COURT: Thank you.

21 The next matter is the Kathleen Arnold and Timothy  
22 Cotten adversary proceeding against Lehman Brothers Holdings.  
23 I understand that Kathleen Arnold is on the telephone or was  
24 scheduled to be on the telephone.

25 MS. ARNOLD: Yes, Your Honor.

1 THE COURT: Is Mr. Cotten available, as well?

2 MS. ARNOLD: Yes, he is.

3 THE COURT: Is he also on --

4 MS. ARNOLD: Go ahead and speak to the judge.

5 THE COURT: I'm sorry?

6 MR. COTTEN: Good afternoon, Your Honor.

7 THE COURT: All right, fine.

8 Let's proceed.

9 MS. MARCUS: Good afternoon, Your Honor. Jacqueline  
10 Marcus from Weil, Gotshal & Manges on behalf of Lehman Brothers  
11 Holdings Inc. and its affiliated debtors, as well as Aurora  
12 Bank.

13 We're here, Your Honor, on the debtors' notice of  
14 presentment of order establishing briefing and hearing schedule  
15 in the adversary number 11-1540. At the last hearing, which  
16 was a pre-trial conference, the parties, with the help of the  
17 Court, agreed upon a briefing schedule. The debtors prepared  
18 the form of order and tried to get Ms. Arnold and Mr. Cotten to  
19 agree to the form of the order. When we were unable to get  
20 their agreement, we filed a notice of presentment on April  
21 21st. At about the same time, plaintiffs filed an amended  
22 complaint.

23 On April 26th, 2011, plaintiffs filed an objection to  
24 the form of the order that the debtors had proposed. It's not  
25 quite clear whether plaintiffs object that LBHI is seeking too

1 much time or not enough time to respond. They seem to believe  
2 that LBHI is treading on rights granted to the plaintiffs under  
3 the federal rules and ignore the fact that the Court dealt with  
4 these issues at the April 13th conference.

5 While it is probably procedurally proper for the  
6 debtors to request the Court to enter the order in the form  
7 that we filed which we believe accurately reflects the Court's  
8 ruling on April 13th, the debtors believe it's more practical  
9 to set the briefing schedule in light of the subsequent  
10 developments, in particular, the filing of the amended  
11 complaint which required LBHI to respond by filing a new motion  
12 to dismiss. Thus, without changing the June 15th hearing date,  
13 the debtors have suggested that plaintiffs be provided until  
14 May 31 to respond to LBHI's motion to dismiss the amended  
15 complaint which was filed on May 9th, and the debtors' reply  
16 would be due on June 8th, and we would proceed with the hearing  
17 on June 15th.

18 The debtors notified the plaintiffs of their  
19 intentions on May 11th. The plaintiffs have indicated that  
20 they're not in agreement with the proposed schedule, and they  
21 want to conduct discovery and have a trial on June 15th.

22 Yesterday, we provided the plaintiffs with the  
23 blacklined copy of the proposed pre-trial order. The  
24 plaintiffs' position appears to be similar to the argument that  
25 they made at the April 13th hearing, and as indicated on the

1 transcript of the April 13th hearing, the plaintiffs are  
2 required to respond to the motion and discovery is not  
3 appropriate at this point. As a result, the debtors request  
4 that the Court enter the revised pre-trial order and require  
5 the plaintiffs to respond to the motion to dismiss by May 31.

6 THE COURT: Okay. Well --

7 MS. MARCUS: I have a marked up order.

8 THE COURT: I'll take a look at the order. I want to  
9 give Ms. Arnold and Mr. Cotten an opportunity to respond. But  
10 I'd like to make a couple of points before I hear from them.

11 First of all, I have looked at the papers that have  
12 been filed of record, including the amended complaint and the  
13 renewed and modified motion to dismiss filed by LBHI. There is  
14 also a pleading that was filed this week which I have not had a  
15 chance to read in full detail, but I have reviewed it to get an  
16 understanding of generally what's being asserted, although I  
17 must admit, I don't entirely understand it, which is a pleading  
18 by the plaintiffs seeking some form of expedited relief. And  
19 it is not clear to me why that was filed and what relief was  
20 being sought. But it seems to me that that's a separate matter  
21 unless the plaintiffs can demonstrate that it connects to the  
22 proposed briefing schedule.

23 So my first question for Kathleen Arnold is to explain  
24 the purpose of the filing that was made this week and whether  
25 or not there is a request that that matter be combined in some

1 fashion or another with the briefing in respect of the motion  
2 to dismiss. It seems to me that it's a separate matter, but I  
3 can't tell.

4 MS. ARNOLD: Your Honor, you're correct, it is. Thank  
5 you. It is a separate matter, and probably what I'm seeking  
6 from what I can understand will be a process here is that that  
7 would be heard at the June 15th hearing.

8 THE COURT: Okay, well, I'm not sure we're going to  
9 have a hearing on June 15th --

10 MS. ARNOLD: Okay.

11 THE COURT: -- yet. We haven't scheduled that. One  
12 of my concerns -- and I mentioned this last month -- is that  
13 the issues that are being presented by LBHI in their motions to  
14 dismiss are fundamentally questions of bankruptcy jurisdiction.  
15 And as a consequence, generally speaking, it takes an  
16 experienced bankruptcy lawyer to comprehend and deal with these  
17 issues. And for that reason, I'm going to reiterate what I  
18 said last month which is that I think even though you have said  
19 you don't have the financial ability to engage counsel, it  
20 would be desirable if you could at least seek out pro bono  
21 counsel. And I am aware, just from having checked the web  
22 sites in Baltimore, that there are a variety of services  
23 comparable to those that are available in New York to provide  
24 legal services at no charge to individuals who can't afford  
25 private counsel.

1 I'd like to ask whether or not you've given any  
2 thought to engaging pro bono counsel to assist you in this  
3 matter.

4 MS. ARNOLD: Yes, Your Honor, we have, and as a matter  
5 of fact, we've taken it a step further and tried to engage  
6 counsel within the last two weeks. But we will -- we have not,  
7 with earnest -- the last time that we tried to engage pro bono  
8 counsel was probably a couple years ago in Baltimore. We have  
9 not tried that since our last meeting or conference but will do  
10 that.

11 THE COURT: Okay, well, it's partly for that reason  
12 that I'm not sure that this schedule is the schedule that we  
13 should be following. I'd like to give the plaintiffs what  
14 amounts to one last opportunity to get counsel involved. And  
15 frankly, and I'm just going to tell you this because I've  
16 reviewed the papers, I believe that if counsel were involved in  
17 this matter, that counsel might advise the plaintiffs that they  
18 have a serious jurisdictional problem, and as a result, so much  
19 of the effort which is going into the bankruptcy case might be  
20 expended elsewhere. That's not to say that I have prejudged  
21 this, but the issues raised in the two motions to dismiss in  
22 connection with subject matter jurisdiction would be very  
23 difficult to rebut, and that's one of the reasons why I think  
24 it's important that a lawyer be involved. This is  
25 fundamentally a question of whether proper claims can be made



1 based upon the facts as I understand them against Lehman  
2 Brothers Holdings Inc., the ultimate parent of Aurora. And  
3 that will be very challenging because there is separate  
4 corporate status and Aurora is not a debtor in this court.

5 So before we get into scheduling, it seems to me that  
6 these plaintiffs need sound legal advice. And I can tell from  
7 what I've read that they feel aggrieved, aggrieved by facts and  
8 circumstances that go back perhaps eight years. I also  
9 understand based upon my review of the papers, that these  
10 plaintiffs have been involved in litigation in state court, in  
11 federal court, and in bankruptcy court in Maryland and are now  
12 seeking relief here. And all of this litigation suggests that  
13 these individual plaintiffs are experienced when it comes to  
14 what goes on in court, but by their own admission, do not have  
15 the kind of legal training and knowledge to be able to  
16 understand some of the sophisticated legal theories that are  
17 being advanced by the debtor.

18 So I think step one in this process is for the  
19 plaintiffs to renew their efforts to retain counsel. But that  
20 can't be an open-ended opportunity. It seems to me that  
21 between now and, say, June 15, there might be an opportunity to  
22 engage counsel, and you'll either be successful or unsuccessful  
23 in that effort. And that once counsel has been engaged,  
24 counsel might either choose not to pursue this litigation or  
25 identify legal arguments that I haven't considered, and papers

1 should be filed in opposition to the motion to dismiss. For  
2 that reason, I think that a better schedule would be a hearing  
3 in July at the July omnibus hearing, instead of in June, and  
4 the subject matter of that hearing would be purely the question  
5 of subject matter jurisdiction. There will not be an  
6 evidentiary hearing that relates to the facts and circumstances  
7 that involved the property that was owned by these plaintiffs,  
8 but rather whether or not their original complaint and amended  
9 complaint assert claims that are cognizable in this bankruptcy  
10 case.

11 MS. ARNOLD: Thank you, Your Honor.

12 THE COURT: I think the parties should once again try  
13 to work out a deadline consistent with this timeline for the  
14 submission of papers in opposition to the motion to dismiss.  
15 And if the parties can't do that, I'm going to make a  
16 suggestion. And that suggestion is -- and I don't have the  
17 date of the July hearing in mind. Do you have that date?  
18 Let's see if we can find that date, so we can tie this to  
19 actual --

20 MS. MARCUS: Your Honor, I think it may be July 20th,  
21 but I'll know in a minute.

22 THE COURT: Is it July 20th?

23 MS. MARCUS: I don't know yet. Technical  
24 difficulties.

25 THE COURT: Let's see if anybody on my side knows.

1           It looks like it's July 20th. So if July 20th is the  
2           date of the omnibus hearing, I think we should back up about  
3           ten days from that, and that it would be reasonable for papers  
4           in opposition to the motion to dismiss no later than the close  
5           of business on July 8th, and it would be responsible for any  
6           further reply in support of the motion to be made by no later  
7           than the close of business on July 15th.

8           MS. MARCUS: That's fine, Your Honor. I take it we're  
9           just going to that timeline, rather than trying to work it out  
10          amongst ourselves. That's the debtors' preference.

11          THE COURT: If you can work it out amongst yourselves,  
12          that's fine, but if you can't, I've spoken --

13          MS. ARNOLD: That's fine.

14          THE COURT: -- in terms of the dates. I've just come  
15          to the conclusion that it's hard to reach agreement, and for  
16          that reason, I'm simply imposing some discipline on the process  
17          by proposing dates.

18          MS. MARCUS: I appreciate that, Your Honor.

19          THE COURT: Okay.

20          MS. ARNOLD: Thank you.

21          THE COURT: So and I think it would really be helpful  
22          to the plaintiffs to get a lawyer. I can't vouch for either of  
23          these organizations, but my chambers staff found two names and  
24          numbers just by looking online. One is Maryland Volunteer  
25          Lawyer Services --

1 MS. ARNOLD: Okay.

2 THE COURT: -- and the other is Civil Justice,  
3 Incorporated. I have no idea if these are good groups --

4 MS. ARNOLD: We understand.

5 THE COURT: -- but they may be helpful. The phone  
6 number of the first is 410-547-6537. The phone number of the  
7 second is 410-706-0174.

8 MS. ARNOLD: Thank you.

9 THE COURT: I would also suggest that you might place  
10 a call to the Baltimore Bar Association and speak to people  
11 there about their business bankruptcy committee -- I'm sure  
12 they have one -- and there might be people within that group  
13 who could be helpful to you.

14 MS. ARNOLD: Thank you, Your Honor.

15 THE COURT: Okay.

16 MS. ARNOLD: We appreciate it.

17 THE COURT: All right.

18 MS. ARNOLD: Have a good day, now.

19 THE COURT: The next matter is Brooklyn Hospital  
20 Center v. Aurora Bank. And we have a similar issue.

21 MS. MARCUS: Yes, we do, Your Honor.

22 MR. GOTTLIEB: Good afternoon, Your Honor. Lawrence  
23 Gottlieb, Hass & Gottlieb, on behalf of Brooklyn Hospital  
24 Center.

25 THE COURT: Okay.

1 MS. MARCUS: Your Honor, Jacqueline Marcus, again, on  
2 behalf of Aurora Bank.

3 Brooklyn Hospital -- we're here today on Aurora Bank's  
4 motion to dismiss the complaint for lack of subject matter  
5 jurisdiction. Brooklyn Hospital Center filed the complaint  
6 against Aurora seeking a determination of the extent, validity,  
7 and priority of a mortgage lien ostensibly held by Aurora. To  
8 refresh the Court's recollection, Aurora is not one of the  
9 debtors in these cases. Aurora is not even a subsidiary of one  
10 of the debtors, although that wouldn't really matter. Rather,  
11 Aurora is a subsidiary of Lehman Brothers Bank Corp., Inc., a  
12 nondebtor subsidiary of LBHI.

13 Based on the fact that the action was commenced  
14 against the nondebtor, Aurora filed the motion to dismiss  
15 pursuant to Federal Rule of Civil Procedure 12(b)(1) and  
16 Federal Bankruptcy Rule 7012(b). As set forth in Aurora's  
17 motion and again in its reply, under Section 1334(b), this  
18 Court has subject matter jurisdiction over all civil proceeding  
19 arising under Title 11 or arising in or related to cases under  
20 Title 11. The incident adversary proceeding is none of those.

21 In its complaint, Brooklyn Hospital Center alleges, in  
22 effect, that the assets of Aurora are the assets of LBHI, and  
23 therefore, are property of the estate. That position is  
24 squarely at odds with the Second Circuit's decision in In re:  
25 Beck Industries, Inc., 479 F.2d 410. In Beck, the Second

1 Circuit held, and I quote, "Ownership of all of the outstanding  
2 stock of a corporation, however, is not the equivalent of  
3 ownership of a subsidiary's property or assets." That's at 479  
4 F.2d at 415. As Brooklyn Hospital Center notes, Beck was  
5 decided prior to the enactment of the Bankruptcy Code.  
6 However, several cases have already held that the reasoning of  
7 Beck applied equally to jurisdiction under the Bankruptcy Code,  
8 and I refer the Court to the Mayco and Tower order decisions in  
9 this Court, as well as the Windstar case in the Delaware  
10 Bankruptcy Court.

11 Moreover, the ramifications of the interpretation of  
12 related to jurisdiction advocated by Brooklyn Hospital Center  
13 would be profound. Basically, this Court would have subject  
14 matter jurisdiction over every dispute regarding any asset  
15 belonging or ostensibly belonging to any of the debtors' more  
16 than 1,000 active nondebtor subsidiaries. That simply can't be  
17 the right answer and would make administration of these cases  
18 even more impossible than it already is.

19 An additional reason that the Court lacks subject  
20 matter jurisdiction over this dispute is that the debtors'  
21 nondebtor subsidiaries no longer even own an interest in the  
22 loan that is the subject of the dispute. In support of its  
23 motion to dismiss, Aurora filed a declaration of Daniel Glanz  
24 (ph.), a vice president, portfolio management, at LAMCO, LLC.  
25 Mr. Glanz is present in court this afternoon. In his

1 declaration, Mr. Glanz explains that the loan was sold by  
2 Aurora to LBHI, and then by LBHI to Fannie Mae in April of  
3 2004. As a result, even if Aurora has no interest in the loan,  
4 BHC's premise that the assets of Aurora constitute property of  
5 the estate is not even applicable here.

6 In its objection to the motion to dismiss, Brooklyn  
7 Hospital makes essentially three points. First, it relies on  
8 Celotex Corporation v. Edwards to assert that related to  
9 jurisdiction exists here. In Celotex, the Supreme Court quoted  
10 with approval the tests set forth in Paycorp v. Higgins (ph.)  
11 as follows: "An action is related to bankruptcy if the outcome  
12 could alter the debtors' rights, liabilities, options, or  
13 freedom of action either positively or negatively, and which in  
14 any way impacts upon the handling and the administration of the  
15 bankruptcy estate." The Court went on to note, "But whatever  
16 test is used, these cases make clear that bankruptcy courts  
17 have no jurisdiction over proceedings that have no effect on  
18 the estate of the debtor."

19 The facts in Celotex are instructive and  
20 distinguishable from the facts, here. Celotex, the debtor,  
21 prior to its petition date, had obtained a supersedeas bond to  
22 secure a judgment while it appealed that judgment. To secure  
23 its obligation to the insurer, Celotex posted collateral with  
24 the insurer. Post-petition, Celotex obtained the Section 105  
25 injunction from the bankruptcy court that precluded the

1 plaintiff in the litigation from executing on the bond. The  
2 Supreme Court upheld the subject matter jurisdiction of the  
3 bankruptcy court to issue the Section 105 injunction on the  
4 basis that the action to execute on the bond was related to  
5 Celotex's Chapter 11 case. The distinction is very apparent.  
6 If the plaintiff were permitted to enforce the bond, the  
7 insurer would have had a secured claim against the debtor. The  
8 bankruptcy court, in its determination, had concluded that  
9 permitting judgment creditors to execute on their bonds, "would  
10 have a direct and substantial adverse effect on Celotex's  
11 ability to undergo a successful reorganization."

12 BHC also relies on the Third Circuit's decision in  
13 Paycorp v. Higgins. While Paycorp sets for the generally  
14 accepted test for related to jurisdiction, it's notable that  
15 the Paycorp court found that related to jurisdiction did not  
16 exist in that matter. In that case, Paycorp was the defendant  
17 in a products liability action. It filed a third-party  
18 complaint against Johns-Manville. When Johns-Manville filed  
19 for relief under Chapter 11, Paycorp tried to have the entire  
20 action removed to the bankruptcy court on the basis of related-  
21 to jurisdiction. The Third Circuit noted as a threshold matter  
22 that the suit was between two nondebtors, like in this case.  
23 As importantly, the Court noted that even though the outcome of  
24 the state court action might lead Paycorp to file an  
25 indemnification claim against the debtor, Manville, "The



1 bankruptcy estate could not be affected in any way until the  
2 Paycorp/Manville third-party action is actually brought and  
3 tried." The court, therefore, held that there was no related  
4 to jurisdiction, and the action could not be removed.

5 Here, if Brooklyn Hospital Center prevails in  
6 establishing in the state court action that it has a superior  
7 interest in the real estate that is the subject of the dispute,  
8 it will have no effect on any of the debtors, either directly  
9 or indirectly. Thus, there is no related to jurisdiction under  
10 the standards articulated in Celotex or Paycorp.

11 Brooklyn Hospital Center's second argument is that  
12 Aurora has submitted to the Court's jurisdiction in the past.  
13 However, unlike personal jurisdiction, a party cannot consent  
14 to subject matter jurisdiction. If a court lacks subject  
15 matter jurisdiction, then the matter may not be heard. In  
16 addition, Brooklyn Hospital Center misconstrues what has  
17 occurred in this court in the past with respect to Aurora. The  
18 two proceedings cited by Brooklyn Hospital Center in which no  
19 motion to dismiss for lack of subject matter jurisdiction was  
20 made, involved actions against Aurora as well as one or more of  
21 the debtors in these cases. That is a critical and dispositive  
22 difference.

23 Third, Brooklyn Hospital Center contends that the  
24 motion to dismiss should not be granted because there is no  
25 pending state court proceeding. Aurora has filed a declaration

1 of Avery S. Mehlman, a partner at Herrick Feinstein, co-counsel  
2 to Aurora in the state court action in support of the motion.  
3 Mr. Mehlman hoped to participate telephonically because he's  
4 tied up in a deposition today, but I'm not sure if he was able  
5 to join the hearing.

6 THE COURT: Let's find out. Are you on the line, sir?  
7 No response suggests that he's not on the line.

8 MS. MARCUS: I agree. Mr. Mehlman's declaration  
9 states that he was present in court on June 16th, 2010 when the  
10 state court issued a default judgment granting the motion of  
11 Aurora Loan Servicing to reargue. Moreover, whether there is a  
12 pending state court proceeding is really irrelevant to the  
13 question of the Court's subject matter jurisdiction.

14 For all of the foregoing reasons, Your Honor, the  
15 debtors request that the Court grant the motion to dismiss.

16 THE COURT: All right, thank you.

17 MR. GOTTLIEB: Good afternoon, again, Judge. Lawrence  
18 Gottlieb.

19 Your Honor, when I was retained by this client,  
20 Brooklyn Hospital, they were faced with the collection of a  
21 debt that's been due for approximately eight years, and you  
22 probably understand from the facts, which aren't particularly  
23 germane for purposes of a subject matter jurisdiction dismissal  
24 motion. However, the underlying procedural and factual  
25 determinations that have to be made are something that jumped

1 out to me as something that this Court has absolute expertise  
2 over, i.e., determining the extent, validity, and priority of a  
3 lien. So when I was brought this case and we were going to  
4 commence a new action seeking a declaratory judgment as to  
5 whether Brooklyn Hospital has superior lien interest, vis-a-vis  
6 this property, we looked through the file and saw, among other  
7 things, Mr. Mehlman, the self-same Mr. Mehlman who isn't here  
8 today, had written a letter in June 2009, and that's appended  
9 as Exhibit G to our opposition. Mr. Mehlman said, post the  
10 commencement of the foreclosure proceeding, post the filing of  
11 the Lehman bankruptcy, and I quote his letter of June 22, 2009,  
12 in part, he says to Mr. Tamsen who's special real estate  
13 counsel to Brooklyn Hospital, "As you are aware, Herrick  
14 Feinstein represents Lehman Brothers Bank, FSB, the holder of  
15 the note and mortgage encumbering the above-referenced  
16 property." Your Honor, I know as a bankruptcy practitioner,  
17 when I'm faced with that kind of representation and the  
18 potential to run afoul of the automatic stay, I'm not going to  
19 risk commencing an action in state court without either moving  
20 to lift the stay or alternatively, which seemed to me the  
21 better alternative, again, counting on this Court's expertise  
22 in this matter -- this type of matter to commence an adversary  
23 proceeding where this Court could ultimately determine the  
24 extent and validity and priority of the lien held by Aurora  
25 Bank which Mr. Mehlman represented was actually a mortgage held

1 by Lehman Brothers Bank. And that's what brought us here  
2 today, Judge.

3 THE COURT: Well, whether it's Aurora or Lehman  
4 Brothers Bank, and I believe Aurora is simply Lehman Brothers  
5 Bank, renamed, that entity is not a debtor here.

6 MR. GOTTlieb: I understand, Judge, and we've been  
7 made very well aware of that. And again, based on my  
8 experience and fearing running afoul of the automatic stay, we  
9 didn't want to take the shot at prosecuting a new state court  
10 litigation. Judge, just by -- tangentially, that state court  
11 litigation, if you check the Unified Court System screenshot,  
12 it shows -- and it's appended to our papers -- that the case is  
13 marked disposed. That's the only written determination on  
14 file. It shows a decision by Judge Starkey of four years ago  
15 where he, on his own sua sponte motion, on a routine motion to  
16 appoint a referee, determined that Lehman Brothers was out of  
17 luck because by virtue of a sheriff sale, it wiped out a junior  
18 lien. Now, Judge Starkey may have been wrong, he may have been  
19 right, and ultimately, Mr. Mehlman brought a motion to reargue,  
20 and it was granted on default. There's no paper memorializing  
21 that determination; in fact, that determination took place --  
22 we're coming up on the year anniversary, and it sounds like,  
23 based on the motion papers, as well as the reply, that that's  
24 something that's going to be starting up again, and  
25 unfortunately, Brooklyn Hospital's going to have to dig itself

1 out of a bit of hole in the state court action. As you may  
2 have seen in our papers, there was an improper notice of  
3 appearance filed by corporation counsel on behalf of Brooklyn  
4 Hospital apparently under the false presumption that it was the  
5 New York Health and Hospitals Corporation that was being sued.  
6 And they filed the notice of appearance and waiver of papers  
7 and didn't participate within the confines of that foreclosure  
8 proceeding. So I don't believe it's going to concern you, Your  
9 Honor, but we're going to have to move for leave to intervene  
10 and vacate the default.

11 THE COURT: Well, you have a long-standing dispute  
12 relating to the collection of a bill for services rendered to  
13 somebody that used to own this piece of property who  
14 transferred the property to her daughter who obtained a life  
15 tenancy to stay in the property. And your goal here is not to  
16 complicate things, but presumably establish whatever rights you  
17 can establish in a court of competent jurisdiction, correct?

18 MR. GOTTLIEB: That's correct, Judge, and we felt this  
19 was the court of most competent jurisdiction.

20 THE COURT: So having heard the arguments of counsel  
21 for Aurora, which I find persuasive, I might add, let's just  
22 say for the sake of discussion that I were to dismiss this  
23 litigation on the grounds of subject matter jurisdiction, and  
24 having heard but not making a finding on the basis of what I've  
25 heard, that there is a pending state court litigation that you

1 could attempt to get involved in to protect your interests or,  
2 alternatively, based on what you just said five minutes ago,  
3 you could commence another litigation in state court, how is  
4 your client aggrieved by virtue of a determination that I make  
5 that you don't have -- that there's no subject matter  
6 jurisdiction as to this claim against Aurora?

7 MR. GOTTLIEB: Other than the fact that we're going to  
8 have to go across the river, Judge, and deal with a state court  
9 judge, I don't think we are.

10 THE COURT: Okay. I appreciate your saying that,  
11 because that's what I thought. And that's a very good reason  
12 to grant the motion to dismiss. The arguments made -- I'm  
13 going to give you a chance to make whatever argument you want  
14 to make, and I've looked at your papers, but the arguments made  
15 by Aurora in this case are compelling.

16 For one, for the last about two and a half years, I  
17 have been involved in matters that involve Lehman Brothers  
18 Holdings Inc. and its filed and, in some cases, unfiled  
19 subsidiaries, one of those being Aurora. And on various  
20 occasions, I have approved the advances of capital from the  
21 debtors to Aurora to support Aurora's regulatory capital.  
22 Throughout that process, and there have been perhaps four or  
23 five hearings that have involved the debtors' support of  
24 Aurora, it was made very clear to me that Aurora was a  
25 nondebtor. And the Lehman entities were supporting Aurora in

1 reference to protecting their indirect equity investment in  
2 that enterprise.

3 I happen to agree with the parade of horribles  
4 argument made by Ms. Marcus. If every claim relating to Lehman  
5 Brothers Bank, now known as Aurora FSB, were deemed to be a  
6 claim related to the administration of the LBHI bankruptcy  
7 case, as they said in Jaws, I'm going to need a bigger boat.  
8 I'm going to need a much bigger boat. And we couldn't manage  
9 that.

10 But more particularly, if you apply the fundamentals  
11 of bankruptcy jurisprudence, recognizing that bankruptcy  
12 jurisprudence should be interpreted broadly, there is still no  
13 conceivable impact that the litigation that you are bringing  
14 against Aurora can have on the administration of any of these  
15 debtors, and I'm unable to find it. If you can tell me that  
16 I'm missing something, this is your chance.

17 MR. GOTTLIEB: Your Honor, without further factual  
18 discovery, I'm just not able to do that. And I don't know if I  
19 want to spend my client's money engaging some kind of pre-  
20 filing discovery. It's just not worth it. So I'm going to, of  
21 course, defer to the Court's ruling. I thought under Celotex  
22 and given what we perceive to be very broad-based jurisdiction,  
23 the Court's ability to assert broad-based jurisdiction, we were  
24 hoping that we'd find ourselves in this court. But I  
25 understand that when the facts present themselves, that we may

1 not have a basis for jurisdiction, and of course, we're going  
2 to defer to your ruling.

3 THE COURT: Fine. On the basis of this argument and  
4 colloquy, I'm granting the motion to dismiss. I will entertain  
5 an order consistent with this ruling. And if, by chance, you  
6 should decide to appeal this determination, I reserve the right  
7 to supplement the statements made on today's record with a  
8 written opinion.

9 MR. GOTTLIEB: Your Honor, can we ask that that order  
10 be settled.

11 THE COURT: I see no reason why you can't agree on the  
12 form of order.

13 MS. MARCUS: Sure, absolutely.

14 MR. GOTTLIEB: Okay, so we'll consensually attempt to  
15 do that.

16 THE COURT: That's fine. In that case, I believe we  
17 have concluded the afternoon's calendar.

18 MS. MARCUS: I think that's right. Thank you, Your  
19 Honor.

20 MR. GOTTLIEB: Thank you, Judge.

21 THE COURT: We are adjourned.

22 (Whereupon these proceedings were concluded at 2:54 PM)  
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I N D E X

RULINGS

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Complaint Granted		

C E R T I F I C A T I O N

I, Dena Page, certify that the foregoing transcript is a true  
and accurate record of the proceedings.

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